Supreme Court, U.S.
FILED
DEC 28 1984
ALEXANDER L. STEVAS
CLERK

No. 84-67

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES L. LINDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner intervened in these contempt proceedings against an attorney who had been subpoenaed to testify and produce documents before a grand jury in the Southern District of California. Petitioner contended that the attorney's testimony and production of documents would violate the attorney-client and work-product privileges.

1. The grand jury was investigating allegations of fraud and the payment of kickbacks in connection with the award by San Diego County to Telink, Inc., of a $24.5 million contract for the installation of a new telephone system. Petitioner was the director of marketing for Telink.

The briefs and record in this case were submitted to the court of appeals under seal, and we therefore shall not cite to the record. However, after the certiorari petition was filed, an indictment was returned against petitioner and others, charging racketeering, conspiracy, and mail fraud. The indictment describes in detail the allegations of fraud

and kickbacks concerning the San Diego contract. Indictment at 38-55, 56-61.[1] The contract was cancelled by the County after the allegations of fraud were made public. A legal dispute then arose between Telink and the County concerning the cancellation, but that dispute was settled on May 6, 1983, when the County agreed to pay Telink $2.4 million, plus an additional amount of up to $500,000 in equipment restocking charges, in return for Telink's dropping of its $57 million claim against the County. Petitioner and others are charged in the pending indictment with, inter alia, having caused Telink's attorney to submit false and fraudulent documentation to the County Board of Supervisors in connection with the dispute, thereby fraudulently inducing the County to settle. Indictment at 56-61.

The subpoena issued to Telink's attorney during the grand jury investigation directed him to produce certain documents pertaining to communications between the attorney and petitioner and others affiliated with Telink that related to the contract dispute with San Diego County. See Pet. 5-6. Petitioner contended that he had an attorney-client relationship with the attorney and that disclosure of the information covered by the subpoena would violate the attorney-client and work-product privileges. The government contended that those privileges had been waived by virtue of public disclosures made in letters sent by the attorney to the County and that the crime-or-fraud exception to the privileges applied.

The district court ordered the attorney to testify, and held him in contempt pursuant to 28 U.S.C. 1826 when he refused to do so. The court of appeals affirmed the order of contempt in a brief memorandum opinion. It held that the attorney's voluntary public dissemination of summaries of his investigation into alleged improprieties on the part of

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[1]We have lodged a copy of the indictment with the Clerk of the Court.

Telink officials constituted a waiver of the privileges and that, in any event, the government had produced sufficient evidence to establish that the attorney's services were secured in furtherance of a continuing fraud upon the County, and therefore fell within the crime-or-fraud exception to the privileges (Pet. App. A1).

2. Petitioner filed the instant petition for a writ of certiorari seeking review of the court of appeals' holding. However, we have been informed by the United States Attorney's Office that after the court of appeals rendered its decision and petitioner failed to obtain a stay, the attorney complied with the subpoena. Moreover, as noted above, an indictment has now been returned by the grand jury. As a result, there no longer is a live controversy concerning the application of the attorney-client and work-product privileges — or any questions concerning waiver or the crime-or-fraud exception — as regards the attorney's appearance before the grand jury.

It is conceivable that the question of privilege could arise again at trial. But if the attorney actually is called to testify at trial, it would seem that the return of the indictment charging that the attorney's services were secured in furtherance of a continuing fraud upon the County would itself be sufficient to invoke the crime-or-fraud exception to the attorney-client privilege recognized by this Court in *Clark* v. *United States*, 289 U.S. 1, 15 (1933), and presumably to invoke the identical exception to the work-product privilege as well.[2] See *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19

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[2]Contrary to petitioner's contention (Pet. 10-12), it plainly was appropriate for the district court, prior to the return of the indictment, to rely on the detailed affidavit submitted by the government to establish the prima facie showing necessary for application of the crime-or-fraud exception. A mini-trial on that issue was not required. See, *e.g.*, *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1028-1029 (5th Cir. 1982) (en banc); *In re Sealed Case*, 676 F.2d 793, 814-815 (D.C. Cir. 1982); *In re John Doe Corp.*, 675 F.2d 482, 489-491 (2d Cir. 1982).

(1975). However, any question of privilege that might arise at trial of course is not presented in the instant certiorari petition. But even if it were, it would be presented in an interlocutory posture. If the attorney testifies at trial and if petitioner is convicted, petitioner may raise his privilege claim and any other issues in an appeal of his conviction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12